IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SCA PROMOTIONS, INC.,	§	
Plaintiff and Counter-Defendant,	§	
	§	
	§	
	§	**CASE NO. 3:14-cv-957-O**
v.	§	
	§	
	§	
YAHOO! INC.	§	
Defendant and Counter-Plaintiff.	§	

YAHOO'S REPLY IN SUPPORT OF MOTION TO STRIKE SCA'S BILL OF COSTS & MOTION TO STRIKE SCA'S WAIVED OBJECTION TO YAHOO'S BILL OF COSTS

SCA seeks to have the Court strike Yahoo's awarded costs of $70,269.88, and award it (SCA) $48,170.81 in costs. SCA's requests should be denied for a number of reasons. ***First***, SCA's motion to strike Yahoo's awarded costs is plainly frivolous because SCA waived its right to object to Yahoo's costs. Under Federal Rule of Civil Procedure 54(d)(1), SCA was required to move to strike Yahoo's costs within 7 days of the Clerk's taxation order, but did not do so. *See* ECF No. 254 (Clerk's Dec. 30, 2015 taxation order); ECF No. 257 (SCA's Jan. 13, 2016 objection to Yahoo's costs). SCA has no right to challenge Yahoo's costs or its status as the prevailing party.

Second, SCA has not provided any valid legal basis entitling it (SCA) to costs. Under Rule 54(d), only "the prevailing party" is entitled to costs. SCA filed this lawsuit seeking $9.9 million in contractual termination fees, lost the case (it won zero dollars from Yahoo), and has to pay Yahoo a $550,000 refund as a result. SCA's claim that it was the prevailing party is utterly baseless and not grounded in reality. Simply ignoring these facts and giving them no weight, SCA claims it was the prevailing party because Yahoo filed time consuming counterclaims based on SCA's breach of various contractual confidentiality obligations. But SCA still did not substantially win the matter overall, and therefore it cannot legally qualify as "the prevailing party" under Rule 54.

Third, as SCA was not the prevailing party, and Yahoo was the prevailing party, Yahoo is entitled to all of its costs (even assuming SCA did not waive its objections to Yahoo's costs, which it plainly did). SCA's request that certain deposition transcript fees be stricken because they related to Yahoo's counterclaims is without merit. SCA essentially claims that those counterclaims expanded the litigation beyond SCA's claims, and the Court dismissed those counterclaims. But the counterclaims were duplicative of a number of Yahoo's affirmative defenses (which SCA does not challenge) that SCA's misconduct excused Yahoo's obligations under the Parties' contract. SCA put its performance at issue by filing the lawsuit, and Yahoo was forced to raise SCA's performance as part of its defense. The facts underlying the counterclaims would have been at issue no matter what. SCA cites no authority for the proposition that a prevailing party like Yahoo can essentially be penalized and not awarded costs for pursuing a defense of the case, especially when it ultimately prevailed in the case as Yahoo did here.

For these reasons, and those set forth below, SCA's costs should be stricken. The Court should also deny SCA's motion challenging Yahoo's costs.

ARGUMENT

I. SCA has waived its right to challenge Yahoo's prevailing party status and its awarded costs

Rule 54(d) explicitly provides that a party must object to taxed costs within 7 days of the Clerk's taxation order, or the objection is waived. *See* Rule 54(d)(1) ("On motion served within the next 7 days, the court may review the clerk's action.”). SCA, without any explanation or claim of reasonable and excusable neglect, failed to file its objections within 7 days (it filed in 14 days) and therefore waived its objections to Yahoo’s bill of costs. *See Corwin v. Walt Disney Co.*, 475 F.3d 1239, 1254 (11th Cir. 2007) (denying untimely costs objection); *Bloomer v. United Parcel Serv., Inc.*, 337 F.3d 1220, 1221 (10th Cir. 2003) (same); *Walker v. California*, 200 F.3d 624, 625–26 (9th Cir. 1999) (same); *Rowe v. Maremont Corp.*, 850 F.2d 1226, 1244 (7th Cir. 1988) (same); *Reinhart v. Shaner*, 234 F.R.D. 698, 700 (M.D. Ala. 2006); *Johnson v. Mortham*, 173 F.R.D. 313, 316 (N.D. Fla. 1997); *Alexandria Assocs., Ltd. v. Mitchell Co.*, 800 F. Supp. 1424, 1425 (S.D. Miss. 1992) (same); *Fleet Inv. Co. v. Rogers*, 87 F.R.D. 537, 540 (W.D. Okla. 1978). Accordingly, SCA is not in a position to challenge Yahoo’s awarded costs or its prevailing party status.

II. SCA is not entitled to its costs under Rule 54(d)

SCA does not dispute that there can only be one “prevailing party” in a lawsuit. Indeed, that is exactly what Rule 54(d) states. *See* Fed. R. Civ. P. 54(d)(1) (“[C]osts-other than attorney’s fees-should be allowed to ***the prevailing party.***”) (emphasis added). Rather, SCA bases its whole claim that it was the prevailing party overall in the litigation because it prevailed on Yahoo’s counterclaims. But this argument must be rejected for a number of reasons. ***First***, SCA wholly ignores the fact that it sued Yahoo for $9.9 million, lost the case (it got zero dollars), and has to refund Yahoo $550,000. As set forth in Yahoo’s opening papers, this successful defense (which included a $550,000 refund) is more than sufficient to qualify Yahoo as the prevailing party. SCA makes no attempt to distinguish any of Yahoo’s cases. Rather, SCA cites to *Resolution Trust Corp. v. Gaudet*, 192 F.3d 485, 487 (5th Cir. 1999), which is wholly inapplicable. In that consolidated appeal case, the FDIC was awarded costs for successfully defending a counterclaim for attorneys' fees in a matter after its principal claim was dismissed. Here, SCA not only lost its original claim, but it has to affirmatively pay Yahoo $550,000.

Second, SCA ignores the law with respect to parties who file lawsuits like SCA. A lawsuit plaintiff is a "prevailing party" if the party "succeed[s] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Abner v. Kansas City S. Ry. Co.*, 541 F.3d 372, 382 (5th Cir.2008) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). Or put another way, "a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby*, 506 U.S. 103, 111–12 (1992). SCA plainly cannot satisfy this standard. It did not achieve any of the benefits it sought in bringing its suit. In fact, it has to give back Yahoo $550,000. SCA would have been better off never filing the case. Yahoo was the obvious prevailing party here.

Third, there is no evidence or allegation that the counterclaims were brought in bad faith or are otherwise sanctionable. Indeed, a district court cannot "order the prevailing party to share, or shoulder all of, the costs of the nonprevailing party unless the costs serve as a sanction." *Hall v. State Farm Fire & Cas. Co.*, 937 F.2d 210, 216 (5th Cir. 1991).

III. SCA's objections to Yahoo's costs are waived and/or meritless

As SCA was not the prevailing party, and Yahoo was the prevailing party, Yahoo is entitled to all of its costs (even assuming SCA did not waive its objections to Yahoo's costs, which it plainly did). SCA alternatively claims that the Court should strike certain depositions transcript and subpoena costs totaling approximately $30,000 because they related to Yahoo's counterclaims that SCA breached its confidentiality and other obligations under the Parties' contract. SCA essentially claims that those counterclaims expanded the litigation beyond SCA's claims, and the Court dismissed those counterclaims. This is a false distinction.

Another false distinction is that SCA would not have conducted the depositions listed in its Response, the falsity of which is evidenced by the fact that SCA fought to depose Yahoo's CEO along with one of Yahoo's founders, a fight that led to extensive motion practice. Indeed, SCA claims the following depositions were solely as a result of Yahoo's counterclaims: Marissa Mayer (Yahoo's CEO), David Filo (Yahoo's Co-Founder), Wes Harris, Bianca Miller, Kenneth Fuchs, Warren Buffett, Andrea Rogers, Brad Alessi, John Woodbury, Christian Tregillis, Adam Walker, Wendy Collins, and Chris Hamman. *See* ECF No. 257. As such, SCA is essentially claiming it wouldn't have taken any depositions but for Yahoo's counterclaims. This is a ridiculous argument in that SCA would have supported its claims with deposition testimony despite Yahoo's counterclaims.

Indeed, the facts at issue in the counterclaims would have been at issue in the lawsuit no matter what. Looking solely at Yahoo's affirmative defenses (which SCA does not challenge), Yahoo asserted numerous affirmative defenses precisely addressing the issue of SCA's breach of its confidentiality obligations under the Parties' contract, and whether Yahoo's performance was excused because SCA itself materially breached the Parties' contract. *See* ECF No. 116 ¶¶ 65-67. SCA cites no authority for the proposition that a prevailing party like Yahoo can essentially be penalized and not awarded costs for pursuing a defense of the case, especially when it ultimately prevailed in the case as Yahoo did here.

Conclusion

WHEREFORE, for the reasons set forth above, as the prevailing party the Court should grant Yahoo's Bill of Costs and in so doing deny SCA's Bill of Costs.

Dated: January 27, 2016

Respectfully submitted,

/s/ Thomas Patrick Lane

WINSTON & STRAWN LLP

THOMAS PATRICK LANE
(*Pro Hac Vice*)
tlane@winston.com
MICHAEL S. ELKIN
(*Pro Hac Vice*)
melkin@winston.com
SCOTT M. AHMAD
(*Pro Hac Vice*)
sahmad@winston.com
DORIAN THOMAS
(*Pro Hac Vice*)
dathomas@winston.com
200 Park Avenue
New York, NY 10166
(212) 294-6700
(212) 294-4700 Facsimile
DARRELL W. COOK & ASSOCIATES,
A PROFESSIONAL CORPORATION
DARRELL W. COOK
State Bar No. 00787279
dwcook@attorneycook.com
CATHERINE A. KEITH
State Bar No. 24046193
catherine@attorneycook.com
One Meadows Building
5005 Greenville Ave. Suite 200
Dallas, TX 75206
(214) 368-4686
(214) 363-9979 Facsimile

ATTORNEYS FOR DEFENDANT YAHOO! INC.

CERTIFICATE OF SERVICE

I hereby certify that counsel of record are being served on January 27, 2016, with a copy of this document *via* the Court's CM/ECF system.

/s/ Thomas Patrick Lane
Thomas Patrick Lane